IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.522 OF 2003

Citibank N.A. ... Petitioners

v/s

SBI Capital Market Ltd. ... Respondents

Mr Janak Dwarkadas with Mr P.K. Samdani i/b M/s Dave and Girish and Co. for Petitioners.

Mr Rohit Kapadia with Mr V.R. Dhond and Ms Alpana Ghone i/b M/s Little and Co. for Respondents.

CORAM : D.K. DESHMUKH J.

DATE : 22ND JUNE 2005.

P.C. :-

1. The petitioners by this petition challenge the award made by the learned Arbitrators. The Arbitral Tribunal consisted of three Arbitrators. There are two awards made, one award which is dated 14th April 2003 signed by two Arbitrators and the other award which is dated 17th April 2003 signed by one Arbitrator. Though two awards have been made and different reasons have been given, the conclusion reached by all the three Arbitrators is the same i.e. the claim made by the petitioners is liable to be dismissed. Accordingly, the claim made by the petitioners has been dismissed. The facts that are material and relevant for the purpose of deciding this petition are that the petitioners - Citibank on 30th April 1991 purchased from SBI Capital Market Ltd., which is a subsidiary of the State Bank of India, IRFC bonds of the face value of Rs.50/- crores. Instead of delivering the bonds, the respondents issued two bank receipts (BR) of Rs.25/- crores each, both the receipts were unnumbered. One of the BR of Rs.25/- crores was admittedly discharged against delivery of the bonds physically on 1st May 1991. Against the other BR for Rs.25/- crores, bonds worth Rs.15/- crores were admittedly delivered on 20th June 1991. Thus, so far as this transaction is concerned, bonds worth Rs.10/-

crores remained outstanding. The present dispute between the parties relates to this remaining bonds worth Rs.10/- crores. On 20th May 1991, the petitioners entered into a ready forward transaction in relation to the same IRFC bonds worth Rs.10/- crores. In the readyleg, the petitioners were to sell the bonds to the respondents and in the forward leg, the same bonds were to be purchased by the petitioners from the respondents. On 20th May 1992, in lieu of the bonds, the petitioners received BR No.5523. This transaction was to be reversed on 28th June 1991. Admittedly this transaction was reversed on 28th June 1991. According to the petitioners, this transaction was reversed by discharge and return of BR No.5523. The dispute arose between the parties in relation to this transaction. The dispute was referred to Arbitrators. Before the Arbitrators, the petitioners were claimants. The case of the claimants was that the ready forward transaction dated 20th May 1991 (hereinafter referred to as the second transaction) was completely settled on 28th June 1991 by return and discharge of BR No.5523 which was given by the petitioners to the respondents on 20th May 1991. According to the petitioners, the transaction dated 30th April 1991 in so far as bonds worth Rs.10/- crores is concerned, it was not settled and therefore claim in that regard was made. It was the alternate case of the petitioners that in case it is held that BR No.5523 was

discharged on 28th June 1991 in relation to the outstanding transaction dated 30th April 1991, the award should be made in relation to the ready forward transaction dated 20th May 1991 which was to be reversed on 28th June 1991. According to the petitioners, if the BR No.5523 is taken to have been discharged in relation to the transaction dated 30th April 1991, then the transaction which requires to be closed on 28th June 1991 has remained unsettled and therefore, the petitioners would be entitled to award in relation that transaction. The respondents filed reply. Perusal of the reply shows that the respondents mainly denied the allegations made in the statement of claim. The respondents have not come with any clear and specific stand in relation to the settlement of second transaction. Though the respondents clearly stated relying on the correspondence between the parties that BR No.5523 was discharged in relation the first transaction and though the respondents claimed that the second transaction was also settled, they did not state as to by what method that transaction was closed, by discharge of any other BR than BR No.5523 or by delivery of goods. Both the parties filed documents before the Arbitral Tribunal. The petitioners led oral evidence, seven witnesses were examined on behalf of the petitioners. There was no oral evidence led on behalf of the respondents. Two Arbitrators made the award

dated 14th April 2003 (hereinafter referred to as the majority award) holding that the first transaction was completed by discharge of BR No.5523 and further holding that the second transaction was completed by delivery of physicals by the respondents to the petitioners. The third Arbitrator who made the award on 17th April 2003 arrived at the same conclusion but for different reasons.

2. The learned counsel appearing for petitioners submits that the petitioners had gone before the Arbitral Tribunal with the specific case that BR No.5523 was discharged. It was also issued in the second transaction. He submits that it is nobody's case that there is any other BR than the BR No.5523 which was outstanding between the parties at the relevant time and therefore, accordingly the first transaction dated 30th April 1991 was not settled and therefore, the petitioners were entitled for the award. The learned counsel submits that however, on the basis of the correspondence between the parties, in the majority award, a finding has been recorded that BR No.5523 was discharged in relation to the first transaction. It was not the case of the respondents that for completing the second transaction, physicals were delivered. The respondents never pleaded that it had delivered physicals for completing the second transaction. It is

submitted that the fact that the documents that were produced by the respondents were not recording this aspect, and therefore, it could not be the case of the respondents that the second transaction was completed by delivery of physicals because the documents written by the respondents show that the second transaction was not completed. It is submitted that the second transaction has totally been ignored. It is submitted that even assuming that the finding recorded in the majority award that because BR No.5523 was issued after 28th September 1991, it was returned and discharged in relation to the transaction dated 30th April 1991 which does not lead one to the conclusion that because BR No.5523 was due in relation to the transaction dated 30th April 1991, physicals were delivered for completing the second transaction. According to the learned counsel, such finding will be contrary to the documents produced on record on behalf of the respondents. It was also urged that the Arbitral Tribunal has not also appreciated oral evidence led on behalf of the respondents.

3. On behalf of the respondents on the other hand, it is submitted that perusal of the awards, both majority and the minority award, show that the Arbitrators have appreciated the entire evidence on record and they have recorded findings of facts. The findings recorded by the Arbitrators are possible

findings and therefore, this Court should not interfere with the award. The learned counsel submitted that though it was not pleaded by the respondents that the second transaction was completed by delivery of physicals, documentary evidence led on behalf of the petitioners show that the second transaction was completed by delivery of shares and therefore, as the evidence produced on behalf of the petitioners itself establish that the second transaction was closed by delivery of the physicals and in the face of the clear finding recorded on the basis of correspondence exchanged between the parties that BR No.5523 was completely separate transaction, no fault can be found with the finding recorded by the Arbitral Tribunal. The learned counsel for both the sides have also taken me through the documents on record.

4. On the basis of the record, following can be taken as admitted positions :-

A) On 30th April 1991, the petitioners purchased from the respondents 9 % IRFC bonds of the face value of Rs.50/- crores.

B) The petitioners paid Rs.50,48,25,342.47 as consideration for the said

transaction.

C) On 30th April 1991, the respondents sent to the petitioners two banks receipts for the said bonds of the face value of Rs.25/- crores each.

D) On 1st May 1991, the respondents delivered the bonds physically of the face value of Rs.25/- crores.

E) The petitioners therefore returned one of the two BRs of the face value of Rs.25/- crores. BR of Rs.25/- crores remained outstanding.

F) On 20th May 1991, the petitioners sold to the respondents 9% IRFC bonds of the face value of Rs.10/- crores. This was a ready forward transaction. The transaction was to be reversed on 28th June 1991.

G) On 20th May 1991, the respondents paid Rs.10,02,08,219.18.

H) In lieu of the bonds, the petitioners

issued its own BR No.5523 dated 20th May 1991 in favour of the respondents for bonds of the face value of Rs.10/- crores.

I) On 28th June 1991, the petitioners purchased bonds from the respondents of face value of Rs.10/- crores. The petitioners paid Rs.10,25,99,563.01 to the respondents.

J) Out of the bonds of the face value of Rs.25/- crores which had remained to be delivered under the transaction dated 30th April 1991, what was delivered by the respondents to Canfina on behalf of the petitioners were the bonds of the face value of Rs.10/- crores. This was done on 30th September 1991. It is also an admitted position that the second BR of the face value of Rs.25/- crores which was given by the respondents to the petitioners was returned on 4th October 1991.

K) It is nobody's case that under the first transaction dated 30th April 1991, so far

as the balance bonds of the face value of Rs.10/- crores are concerned, physicals were delivered. It is also an admitted position that BR No.5523 which was received by the petitioners in relation to the second transaction has been discharged and returned.

L) It is an admitted position that no BR other than BR No.5523 between the parties was in dispute at the relevant time.

5. The case of the petitioners was that BR No.5523 was discharged for completing the second transaction leaving the first transaction unresolved and therefore, the award was claimed in relation to the first transaction. The case of the respondents was that the BR No.5523 was discharged admittedly but it was not discharged in relation to the second transaction, it was discharged in relation to the first transaction. Therefore, the first transaction has been completed. The Arbitral Tribunal has also recorded that BR No.5523 was discharged for completing the first transaction. Now, if this finding is accepted, the question arises as to how the second transaction was completed. There was only one outstanding BR and now that BR stands used for completing the first transaction. It may be taken as an

admitted position between the parties that in transactions in securities of this type between the banks, the transactions were completed either by delivering the physicals i.e. security or by delivering BRs in lieu of the security. In view of the finding recorded by the Arbitral Tribunal that BR No.5523 was utilised for completing the first transaction, now an inquiry will have to be made as to what was the method adopted by the respondents for completing the second transaction, whether the respondents had issued any BR for completing the transaction or whether physicals were delivered. So far as the pleading aspect is concerned, though the petitioners have specifically stated that for completing second transaction, BR No.5523 was discharged, the respondents did not take any specific stand. Though assertion of the petitioners that BR No.5523 was utilised for completing the second transaction was denied. In the pleadings admittedly, the respondents have not taken a clear stand as to by what method, the second transaction was completed.

6. So far as the petitioners are concerned, the petitioners have led documentary as well as oral evidence. The respondents have not led any oral evidence but have produced documentary evidence. In my opinion, among all the documentary evidence produced on behalf of the respondents, the document dated 28th June

1991 is relevant. This is a letter addressed to the Manager, Securities Division, SBI, Bombay Main Branch by the SBI Capital Markets Ltd. This letter is signed by the General Manager of SBI Capital Markets Ltd. In that letter, the transaction regarding 9 % IRFC bonds of the face value of Rs.10/- crores is clearly mentioned alongwith three other transactions and a clear instruction is given to complete the transaction by exchange of BRs. Now, this was the document produced on record by the respondents. This document clearly shows that the General Manager of the respondents had issued a clear direction for completion of the second transaction on 28th June 1991 by exchange of BRs. This document completely agrees with the case put up by the petitioners in the claim statement that the second transaction was completed by discharge of BR No.5523. In my opinion, the case of the petitioners in the statement of claim should be taken as established because of the document dated 28th June 1991 and absence of any specific pleading on behalf of the respondents that the second transaction was closed not by discharge of BR but by delivery of physicals, no further inquiry is required to be made. It is to be noted that in the face of the document dated 28th June 1991, the only method by which the respondents could have contended that despite this document, the second transaction was not completed by discharge of BR but by delivery of

physicals was firstly to plead that case and prove it either by oral or by documentary evidence. I have not been pointed out any documentary evidence on record which would show that the instruction which was given by the General Manager contained in the letter dated 28th June 1991 to the Managers, SBI was not followed by him and he adopted contrary to the instructions any other method for completing the second transaction. In my opinion, this was the most crucial document and therefore this document ought to have been considered by the Arbitral Tribunal. Non-consideration of such a crucial, relevant and material document will vitiate the award. Perusal of the majority award shows that this document has been totally excluded from consideration by the Arbitrators. So far as the minority award is concerned, in the minority award, this document is considered in paragraphs 20 and 21. Paragraph 20 of the minority award refers to this document and paragraph 21 considers the documents. Paragraphs 20 and 21 of the minority award read as under :-

> "20. SBI Cap thus refutes Citi Bank's claim for payment of principal or delivery of equivalent value in bonds, together with interest, damages, costs and other compensation. In view of the conflicting contentions, the matter was adjourned for

recording evidence.

21. On the pleadings, several issues arose for consideration. But the main issues are as under :-

a. Citi Bank's claim is that the BR issues by SBI Cap, New Delhi or Rs.25 cr. on 30th April 1991 remained unadjusted in September 1991. Is this correct ?

b. Do the letters from Citi Bank to SBI Cap. amount to admissions ?

c. Is the Citi Bank claim that adjustment of its BR No.5523 on 28th June 1991 remained undetected until June 1992 because of a compensating error, admissible ?

d. If Citi Bank's claim that SBI Cap. BR for Rs.25 cr. remained unadjusted in September 1991 is rejected, can its alternative claim for payment under the R/F transaction of 20th May 1991 be sustained ?

e. Is the R/F transaction of 28th June 1991

invalidated by the Securities Contracts (Regulations) Act 1956 ?

f. Citi Bank holds that the real issue is that SBI Cap. owes Rs.10 cr. arising from a series of transactions. Is this claim admissible ?"

. Perusal of above quoted paragraph 21 shows that this document has been discarded only because it is a cyclostyled document and therefore, according to the Third Arbitrator, it does not involve application of mind. It is an established position on record that on behalf of the respondents, it is the Manager, Security Division, who was acting in the transaction. The letter dated 28th June 1991 was produced by the respondents because it was relevant. This letter clearly shows that instructions were given for completing the transaction by exchange of BRs. Therefore, unless the respondents produce a document on record that these instructions were changed and the Manager, Security Division, was directed by the General Manager to deliver physicals, no way the Arbitral Tribunal could have accepted the case that the second transaction was completed by delivery of physicals.

7. In my opinion, this one document was enough to

record a finding that the second transaction was completed by discharge of BR No.5523 and it was not necessary to go into the oral evidence. Since the Arbitral Tribunal has gone into the oral evidence and the learned counsel appearing for the respondents has also taken me through the oral evidence, I propose to refer to the same. Perusal of the deposition of Mr Sardesai shows that in answer to question No.176, he states that on 28th June 1991, security was received by the petitioners, but he goes on and explains what he understands by the term 'security'. According to him, security means physicals as also BR. His further deposition shows that again in answer to the question No.226, he states that the delivery order was accompanied by the physicals. The delivery order is dated 28th June 1991. Therefore, in view of the contradictory statements made by this witness, all that can be said about this witness is that his testimony is not reliable in this regard and therefore, this witness cannot be relied on to record a finding that the second transaction was closed by discharge of BR No.5523. In my opinion, even if the entire testimony of this witness is discarded, still on the basis of documentary evidence produced by the respondents, only one finding can be recorded that so far as the second transaction is concerned, there was only one instruction given by the respondents and it was to complete the transaction by

exchange of BR and therefore, obviously that transaction was completed by discharge of BR No.5523. Thus, I find that the finding that has been recorded both in the minority award and the majority award that BR No.5523 was not utilised for completing the second transaction is a finding impossible to be reached on the basis of the material available on record. In the result therefore, in my opinion, both the awards are liable to be set aside. Considering the nature of the findings that have been recorded in the majority award and considering that the respondents have not led any oral evidence and have also not taken any definite stand in the pleadings, in my opinion, setting aside of the awards would be an order which will serve the interest of justice. By prayer clause (b) of the petition, the petitioners want this Court after setting aside the awards to supersede the reference. This request is not opposed by the respondents. Therefore, the consequence of setting aside the award would not be that the respondents would require to pay the amount or to deliver the physicals to the petitioners. All that will result from an order setting aside the awards is that the petitioners will get one more opportunity to establish their case. Obviously, the respondents will get an opportunity to defend themselves hopefully by making proper pleadings. Taking overall view of the matter therefore, petition succeeds and is allowed in

terms of prayer clauses (a) and (b). The respondents are directed to pay the costs of this petition to the petitioners as incurred by the petitioners.

. Parties to act on the copy of this order duly authenticated by the Associate / Personal Secretary of this Court as true copy.

. Certified copy expedited.